EMPLOYMENT TRIBUNALS

Claimant: **Mr R Phillips**

Respondent: **Bournemouth & Poole College**

Heard at: **Southampton**
On: **6,7,8,9,10 and 13 (In Chambers) June 2022**

Before: **Employment Judge Rayner**
Mr R Spry-Shute
Mr P English

Representation

Claimant: **Ms I Nl'Man, lay representative**

Respondent: **Mr M Islam Choudhury, Counsel,**

RESERVED JUDGMENT

1. The Respondent has conceded that the Claimant was unfairly dismissed.

2. The Respondent discriminated against the Claimant contrary to section 15 of the Equality Act 2010, for a reason arising from his disability, in that he was selected for redundancy and dismissed for redundancy.

3. The Respondent discriminated against the Claimant contrary to section 20 and 21 of the Equality Act 2010, by the Respondent failing to make a reasonable adjustment to their redundancy process.

REASONS

1. Mr Phillips contacted ACAS to commence ACAS early conciliation on 26 July 2019 and the certificate was issued on 26 August 2019.

2. The effective date of termination of the Claimant's contract was 31 July 2019.

3. Mr Phillips presented a claim to the Employment Tribunal on 31 October 2019 for unfair dismissal and disability discrimination in respect of his selection for redundancy and dismissal by reason of redundancy. He brought claims that he had been discriminated against for a reason arising from his disability and for a failure to make reasonable adjustments.

4. Firstly, the Claimant asserts that he has been discriminated for a reason arising from his disability by the Respondents ignoring the fact that sickness absence was disability related when carrying out matrix scoring, which formed the basis of the selection process for redundancy. He asserts that they should have recognised that his absence was disability related, and the cause of his not having the performance scores that others had, and should have made allowances, or provisions for alternative scoring methods.

5. Secondly, he asserts that the Respondents should have made a reasonable adjustment to the method of scoring him when making the selection for redundancy. He relies on a PCP of the criteria used of assessing the employee's performance based on the previous academic year. He states that this was a year during which he was absent due to his disability of anxiety and depression and that he therefore scored lower on the performance, placing him at risk of redundancy and dismissal.

6. He asserts that the Respondent should have adjusted their scoring to reflect the impact disability related absence, or that they should have adjusted the time period to assess the performance over a period not affected by disability related absence.

7. The Respondent filed their grounds of resistance on the 17 December 2019 and filed amended grounds of resistance on the 2 July 2020.

8. The Respondent conceded in the amended grounds of resistance that the Claimant was disabled at the material times by reason of both impairments of

diabetes and by reason of stress, anxiety and Depression, for the purposes of the Equality Act 2010.

9. The Respondent also conceded in its amended ET1 that it had knowledge of the Claimant's impairment and disability by reason of diabetes only at all material times.

10. The Respondent denies that it had actual or constructive knowledge at the material times that the Claimant was disabled by reason of stress, anxiety and depression. Following concessions as set out below, this is the only remaining issue which the tribunal had to determine on the facts.

11. The Respondent conceded that the Claimant's sickness absence of 5 months in 2018, was disability related sickness arising from stress; anxiety and depression.

12. Case management hearings took place on 26 May 2020; 9 July 2021 and 19 May 2022.

13. The Claimants claim of indirect discrimination was dismissed on withdrawal on 9 July 2021.

The issues following Concessions made by the Respondent.

14. The parties agreed a list of issues dated the 15 July 2021. This is in the agreed bundle and reflected the Respondent's position at the start of the hearing.

15. During the course of the hearing the Respondent made further concessions.

16. The Respondent conceded that, in light of the Respondent's witness evidence, the sickness absence was the reason why the Claimant had not been allocated any scores for one part of the scoring matrix, which formed part of the selection process for redundancy.

17. The Respondent also conceded that the Claimant had therefore been disadvantaged or treated unfavourably, for a reason arising from disability in the scoring and therefore the selection process.

18. In respect of its defence under section 15 Equality Act 2010, the Respondent conceded that, whilst its pleaded legitimate aim of selecting people fairly for redundancy remained valid, in the light of the evidence, the Respondent could not argue that the process had been carried out in a proportionate way and that it was not proportionate in the circumstances, and would not succeed. The defence was not pursued.

19. The Respondent conceded that this meant that the discrimination claim under section 15 Equality Act 2010 would succeed, if the ET found that the Respondent had actual or constructive knowledge of the Claimant's disability by reason of stress , anxiety and depression.

20. Thirdly, in respect of reasonable adjustments, the Respondent accepted the scoring matrix used was a PCP which the Respondent had applied to the claimant, and that it substantially disadvantaged the Claimant as a disabled person, because of his sickness absences. Therefore, the Respondent would have had a duty to make reasonable adjustments, if it had had the requisite knowledge of the Claimant's disability and that he was likely to be placed at the disadvantage referred to. (schedule 8, section 20 Equality Act 2010).

21. Following the conclusion of evidence and at the point of closing statements, Counsel for the Respondent conceded that the Claimant had been unfairly dismissed. This concession was in respect of the process, and the application of the criteria for selection, and the availability of suitable alternative employment , which arose when Miss Lewis, another teacher of English who had also been in the pool for selection, resigned, leaving a full time vacant post, which the Respondent conceded should have been offered to the Claimant.

22. Following these concessions, the only issue for determination by the panel was whether the Respondent knew or could reasonably have been expected

to know that the Claimant was a disabled person at the material times by reason of stress anxiety and depression.

The Respondent's Supplementary witness statements

23. On the first day of hearing the Claimant raised a concern that the Respondent had sent them additional witness statements which they had received shortly before the long bank holiday of the 2nd; 3rd; 4th and 5th of June 2022.

24. The Respondent accepted that they had sent two supplementary witness statements, one from Tracy Griffin and one from Caroline Wayment, to the Claimant.

25. Mr Islam Choudhry, counsel for the Respondent explained that it had been realised at a late stage that the Respondent witness statements did not deal with the question of whether or not the Respondents knew or could reasonably have been expected to know that the Claimant was disabled by reason of stress anxiety and depression at the material times.

26. On realising their omission, the Respondent's solicitors decided to deal with the issue by drafting and serving supplementary witness statements on the Claimant. This was done, but no application was made for leave to serve the statement and no explanation was given to the Claimant for the late service of the statements. The statements were served shortly before the long Jubilee bank holiday weekend.

27. Mr Islam Chaudhry explained that those instructing him had sent the witness statements to the Claimant so that he would have the opportunity of reading them in advance of the hearing. He stated that no objection had been received from the Claimant to the statements being submitted to the Employment Tribunal.

28. The Claimant, through his representative Mrs Linda Ni'man, who is not a lawyer but lay representative, made it clear that they did object to the late submission of the witness statements and that the provision of them shortly before the bank holiday had caused them stress and confusion.

29. Following an explanation of the process to the Claimant by the Judge, Mr Islam Choudhry made an application for permission to file and serve the supplementary statements and to rely upon then as evidence in chief. He candidly accepted that there had been an oversight in respect of the evidence necessary, and that following review of the witness statements which had already been exchanged, in the light of the discussion that took place at the case management hearing in May 2022, the Respondents had realised that they needed to provide some evidence in chief on the point. Mr Islam Choudhry accepted that the supplementary witness statements had been provided at a very late stage within the chronology, but submitted that the Respondent would be significantly prejudiced were they not allowed to lead evidence in chief on the question of knowledge. He submitted that any prejudice to the Claimant could be dealt with by allowing the Claimant further time to read and prepare to deal with the additional matters in cross examinations.

30. The Claimant objected to the late provision of the statements and pointed to the three case management hearings that had taken place and the fact that witness statements had been exchanged prior to the latest case management hearing and also referred to the list of issues and the pleaded case which had clearly identified the question of whether or not the Respondents knew that the Claimant was disabled by reason of stress anxiety and depression as an issue in the case.

31. We heard Submissions and we considered the pleadings in the case. We find that the amended pleadings dated 1 July 2020 set out in significant detail the Respondents case on knowledge. The Respondents knew from the outset that this was a fundamental part of their claim. The Respondents have been professionally represented throughout, and ought to have dealt with this issue in their primary witness statements.

32. However, we all agreed that it was in line with the overriding objective and in the interests of justice that the Respondent had the opportunity to lead evidence in respect of knowledge, and considered that the prejudice to the Claimant could be dealt with by ensuring additional and sufficient time to

prepare for any additional cross examination was allowed. If this had led to any delay or adjournment, then the matter could be dealt with by way of costs, if appropriate.

33. We accepted that the Claimant would require some further and additional time in order to read and absorb the information within the witness statements and to prepare appropriate cross examination.

34. The Respondent had intended to call Mrs Wayment or Mrs Griffin as the first witnesses but as Mrs Ni'man was not fully prepared for the cross examination and asked for some further time to prepare, Mr Islam Choudhry agreed to call Mr. Johnson who had dealt with the Claimants appeal as his first witness.

35. Mrs Ni'man asked for further time to prepare cross examination in respect of knowledge and it was agreed that the Court would start slightly later on the second day of hearing to give some further time for preparation.

The witnesses Evidence

36. We heard evidence from the following witnesses on behalf of the Respondent

36.1. on the first day of hearing from Mr. M Johnson on behalf of the Respondent. Mr. Johnson was employed by Bournemouth and Poole college as the Vice Principal Finance and Commercial Development. Mr. Johnson dealt with the appeal hearings in the redundancy process and heard and dismissed the Claimants appeal on 19 June 2019.

36.2. Mrs Caroline Wayment, who was employed by the Respondent as the Executive Director Of Human Resources from July 2017 until November 2019 . Mrs Wayment was primarily responsible for the design of the redundancy process, and consultation with the trade unions and the provision of guidance to managers during the process. Mrs Wayment is now retired.

36.3. Mrs Tracey Griffin, who was employed as the Assistant Principal Curriculum from September 2018 until October 2021. Mrs Griffin was

deputy to the Vice Principal Curriculum and Quality and the college strategic lead for English and mathematics.

37. On behalf of the Claimant we heard evidence from the following witnesses:

37.1. Mr. Phillips, the Claimant gave evidence on his own behalf.

37.2. Mr. Martin Edwards, who was the Claimant's UCU officer for six years and who accompanied Mr. Phillips to his outcome meeting on the 29 April 2019 and also attended the Claimant's appeal meeting with him on the 19 June 2019 in his capacity as his union officer. Mr. Edwards worked as an English lecturer for the Bournemouth and Poole college for 29 years and was a trade union officer for six years.

37.3. Jessica Steinberg who was a teaching assistant at Bournemouth and Poole college for nine years. She had attended to accompany the Claimant to his return to work meeting with the Vice Principal Ms Northover in 2017. Miss Steinberg also accompanied the Claimant to a meeting on the 23 April 2019, to review student attendance; performance and retention across English classes, with the Assistant Principal Mrs Tracy Griffin.

37.4. Mrs Okell, who worked as a teaching assistant for four years at Bournemouth and Poole college, supporting the English and Maths department from September 2015 until her retirement in 2020

37.5. Ailsa May Miller, an employment support advocate and advisor for the Dorset Mental Health Forum for eight years, who assisted the Claimant when he was referred to the Dorset Mental Health Forum in May 2018. Miss Miller accompanied the Claimant to his occupational health review in July 2018; assisted him in writing emails to the Respondent and accompanied the Claimant to the return to work meeting on the 30 August 2018 in a cafe in Poole Park, with Sharon Mackett and a representative from the HR department.

38. The witnesses set out above gave live evidence to the Tribunal as well as providing written witness statements.

39. In addition the Claimant provided a witness statement from Barbro Hoel . Ms Hoel was unable to attend at the Tribunal to give evidence in person due to a family emergency. The witness statement was submitted by the Claimant and read by the Panel.

Findings of fact

40. The Claimant started work with the Respondent on 1 August 1994 and worked as a lecturer until 31 July 2019 when his employment was terminated on notice. He had 25 years employment at the point of his dismissal.

41. Since 2012, the Claimant has taught English and functional skills. He also taught English to adults. The Claimant reduced his contract to a 0.8 FTE contract from the beginning of 2017. He states that this was because of his health and asserts that the Respondent knew this.

42. The Claimant was diagnosed with diabetes in 2017, after he had reduced his contract hours.

Knowledge of Disability

43. The Respondent asserts that due to the occupational health advice it received in July 2018 and secondly, due to the fact that the Claimant's sickness absence in 2018 was no more than six months, that the Respondent was not aware that the Claimant was disabled by reason of stress anxiety or depression and that they did not know and could not reasonably have been expected to know that the Claimant was disabled by reason of anxiety and depression at the material times. The Respondent further asserts that it did not have actual knowledge of any alleged substantial disadvantage and denies that it ought reasonably to have known the that the Claimant suffered any substantial disadvantage from the application of the alleged PCP

44. We make the following findings of fact relevant to the question of whether or not the Respondents knew or could reasonably have been expected to know at the material times that the Claimant was a disabled person by reason of anxiety and depression.

45. The decisions taken in respect of the Claimant which are in issue in respect of disability are the process used and the decisions made which led to the decision to select the Claimant for redundancy and the decision to dismiss the Claimant by reason of redundancy. The material times are therefore the period of time starting with the identification of the Claimant as at risk of redundancy, including the scoring of him and others using the matrix and ending with his dismissal.

46. Prior to his selection for redundancy the Claimant had worked for the Respondent for 25 years as teacher. He had a clean disciplinary record and good achievements which he sets out in his statement at paragraph 5 to 7 and on which he has not been challenged. We accept his evidence on these points.

47. The Claimant suffered a number of events in his private life, including the death of his father, which were difficult and stressful for him and which led to him making an application to reduce his teaching load, and to reduce his contractual hours. His request to reduce to 0.8 of a full-time equivalent was dealt with by his then line manager, Mr Barney Selman. The request was agreed in September 2016. Whilst this was described at the time as a temporary arrangement, the Claimant remained as a 0.8 until his termination by reason of redundancy in 2019. Both Mr Selman and Mrs Griffen knew that the Claimant was 0.8 FTE, and Mr Selman knew why. Mrs Griffen would have been aware had she read his file.

48. The Claimant told us that the reason why he sought to reduce his contract hours in 2016, was because he was suffering with stress. He relies on this as evidence that the Respondent knew or ought to have known that he was a disabled person at that point in time.

49. The application form, which is included in the bundle at page 115, states the reason for his request as *Richard wishes to reduce his hours to achieve a better work life balance and reduce the amount of stress that he experiences at work*.

50. The Claimant says that this is evidence that he told the Respondent he was suffering with Stress; The Respondent says that this was simply him reporting he was suffering with stress as a result of factors at work and in his private life, but not that he was suffering with an impairment.

51. We agree with Respondent. At this point, the Claimant was flagging up that he was finding aspects of work and home life stressful and that these were causing him stress. He was not telling the Respondent that he had an impairment or a medical condition.

52. Following this, two things happened in connection with the Claimant's work.

53. First, we accept that the Claimant told the Respondent that he found his timetable stressful.

54. We also accept the Claimant's evidence in respect of an incident that occurred at work, when he was threatened by a student who stated that they would *fillet him with a knife.*

55. We accept that the Claimant did , and most teachers, would have found this incident upsetting and stressful and accept that the Respondent should have recognised that this would be stressful for the Claimant. However, there is nothing in evidence or documents to suggest that the Claimant was telling the Respondent that he found this particularly stressful *because* he had a mental health impairment. We find that the Claimant is again informing his employer that he finds the situation at work stressful.

56. However, we also accept that an employer who is told on several occasions that an employee is finding work and things outside work stressful, particularly where there this is a change, and where there is a persistent and ongoing issue, could be expected to ask further question, or to make enquiries of the Employees health, to see whether or not there may be some underlying health condition. We do not find that such an obligation arose at this point.

57. The Claimant was diagnosed with diabetes in March 2017 and notified his employer. He wrote to Carol Browne to tell her that he has been diagnosed and signed off sick as a result.

58. Following this, the Respondent referred the Claimant to occupational health for a report. We were not shown the referral document, but we have seen the report that was produced, following a telephone consultation with the Claimant on 2 May 2017.

59. The occupational health report is set out at page P 186 of the joint bundle.

60. From the information set out in this OH report we find that
    60.1. Mr Phillips did not tell the OH practitioner on that occasion, that he was suffering with any impairment of anxiety and depression.
    60.2. He did tell the OH practitioner that he was finding his role inherently stressful.
    60.3. The OH practitioner recorded that it is advised to manage stress effectively for a diabetic, as cortisol can raise blood sugar levels. OH advised that the Claimant should be referred for a stress risk assessment of his duties, using the health and safety executive stress tool.
    60.4. The occupational health report refers the employer to three websites for further information, including www.nhs.uk/conditions/stress/anxiety/depression/understandingstress

61. Following the occupational health assessment and the report the Claimant returned to work and met with Anthony Wright, a Respondent manager. They discussed the HSE Stress tool, which includes a form to be filled in and agreed. Following the meeting, Mr Wright filled in the form reflecting the discussion that they had had and with a summary of the issues and with proposed actions and sent it to the Claimant. He invited the Claimant to send it back to him with any corrections the Claimant wanted to make.

62. The form deals specifically with the Claimant's experience of Stress. The form asks for details of the things that might cause stress, and whether any all of them or a particular problem for the Claimant.

63. The form then has a column for setting out what, if anything, can be done for the Claimant about the factors which might be causing stress.

64. In this form, the Claimant has identified with his manager aspects of work which were causing him stress .

65. The form we have seen and the information available at the time tells the employer that the Claimant's job is stressful for him and is leading to him experiencing stress at work. The combination of the occupational health report and the following HSE stress assessment tool inform the Respondent of this fact and the need to manage stress at work for the Claimant.

66. Whilst the form does set out and record that there are several aspects of his work that cause him stress, it does not record or state that the Claimant was at that time suffering from any specific impairment. That was not the purpose of the form.

67. At this point the managers who worked most closely with the Claimant knew that he had had been recently diagnosed with diabetes, and that this was probably a disability, because this is what OH say in their report, and also knew that the Claimant found that his job was stressful and that they are advised to manage stress at work, because it has an impact on his diabetes.

68. The Respondent knew or ought to have known that the Claimant was finding his job stressful, and therefore suffering with stress, and was anxious, that this would have an impact on his diabetes, but not that he has an impairment of anxiety and depression.

69. We find that the information the Respondent had from the Claimant and from occupational health did not put them on notice of an impairment of Stress, anxiety and depression at this point. There was no suggestion from anyone that the Claimants stress was its self a mental health impairment.

70. What the Respondent did know was that stress could impact on diabetes and therefore needed to be managed.

71. We find that even if further enquiries had been made by the Respondent at this point about the Claimant and the stress he was suffering, no one would have given them any further information which would put them on notice that the Claimant was suffering with an impairment of stress, anxiety and depression which might amount to a disability. We find that the inquiries of occupational health were reasonable and appropriate in any event at this stage.

72. In making this finding, we have borne in mind that the Claimant did not agree to the disclosure of his medical records to his employer whilst he remained in their employment, and has only disclosed a relatively limited section of them during the course of these proceedings.

73. From the records we have seen for the period April – May 2017, we find that during this period, there are references to diabetes, but no reference to stress, anxiety or depression. There is no mention of stress at all in the medical reports disclosed for this hearing, which cover the period from June 2016 until June 2017. Diabetes is mentioned and the only medication mentioned is for diabetes.

74. Following the occupational health report and the completion of the stress tool, the Respondent put in place measures to assist the Claimant with managing stress at work.

75. On 3 October 2017, the Claimant was observed in a lesson, without notice. The outcome was that the Claimant was recorded as requiring improvement.

76. Following this, Mr Selman wrote an email to Karen Northover, stating that he had carried out the lesson observation, that Mr Phillips had not taken it well, and that he was concerned that this may bring on an episode of stress for him. He had offered to act as a mentor for the Claimant.

77. We did not hear evidence from Mr B Selman, but he is the person who line managed the Claimant at that time and subsequently, and is also the person who carried out the scoring of him with Tracey Griffen in the subsequent

redundancy selection exercise. He was aware of the Claimant's history of stress, its causes and we find, its progression.

78. At this point in time Mr Selman knew that the Claimant suffered stress and knew that pressure at work may bring on an episode.

79. On 7 November 2017 the Claimant wrote to the Respondent asking for parity, with others who had disabilities, by being give notice of lesson observations. He says that he understands that employees who have conditions which are exacerbated by stress can be given notice of lesson observations as a result of the college policy. He asks for the policy to be applied to him.

80. He says that stress has a deleterious impact on him, that he feels discriminated against, and that the stress impacted on his physical and mental well being. he says that he had felt agitated and suffered a lack of sleep.

81. At this point we find that the Respondent ought to have realised that the Claimant was still suffering with stress and that it was impacting upon his mental well being, and how it was impacting on him, because he had told them. We all agree that this is different quality of information. We consider that any reasonable employer ought to have considered whether or not the college policy of giving notice of lesson observations should be applied to the Claimant, and that this would have involved some discussion with the Claimant about both his diabetes but also about his mental health.

82. We find that had questions been asked at this point, the Claimant would, on balance of probabilities have told his employer that he was anxious and stressed and that this may have led to a referral to OH.

83. We have not seen any response to this request, and accept Mr Phillips evidence that there was none. We are surprised not to see any response to this request.

84. We find that the Claimant was given the benefit of the Respondents policy, but not until later in the chronology, following recommendations from OH,

following the Claimants return to work, and after a period of 5 months absence from work due to his mental health disability in 2018.

85. On 27 November 2017 the Claimant wrote to the Respondent again, this time raising a concern about windows in rooms where he was teaching, which would not open, and asking for a different room allocation so that he could have fresh air. He says that it is an issue for him and others who have health conditions . He refers to his diabetes but makes no mention of mental health.

86. In January 2018 the Claimant was assessed as part of the annual PsR process.

87. In February 2018, the Claimant was absent on sick leave for a short period of time. The reason for his absence was recorded as flu like symptoms.

88. When he returned to work, he was sent the Back to Work Form by Carole Browne and invited by her to set up a meeting with her to discuss his return to work. This was on 6 February 2018.

89. At this point and on the same day Karen Northover, who was the deputy VP Curriculum, contacted the Claimant at 9.03am and asked him instead to meet with her that afternoon at 2.15pm, to discuss his return to work .

90. The Claimant attended the meeting with a colleague, Jessica Steinberg. Ms Steinberg gave evidence to the ET both in the form of a witness statement and under oath. In her witness statement, she stated that Mr Phillips was upset before going into the meeting, in part because he had just received his scores back from Dorset Wellbeing, who had been providing him with some support in respect of his mental health, and these scores suggested to Mr. Phillips that he was suffering with poor mental health.

91. Mr Phillips also gave evidence that he was upset before and during this particular meeting. Mr. Phillips sets out in his statement that he had filled in the form with Dorset Wellbeing about his mental health, received a response with scores showing poor mental health, and had brought a copy of it to the

meeting and that he showed it to Karen Northover. We accept his evidence and the evidence of Miss Steinberg that this is what happened.

92. Neither Mr. Phillips or Miss Steinberg made any notes at that meeting. It was a meeting held by the Respondent and Miss Northover did write on the back to work form. This is the only record of the meeting made in the meeting.

93. Mr. Phillips did produce a copy of a note of his recollection of the meeting that he told us he had made shortly after the meeting. We find that the note he made is a fair reflection of his experience of that meeting.

94. Both Mr. Phillips and his companion Miss Steinberg, say that during the meeting Mr. Phillips was unable to speak and was in tears at some points. We accept that this is true.

95. Both Mr. Phillips and Miss Steinberg also made comments about how Karen Northover had spoken to and dealt with the Claimant during the course of that meeting.

96. Mr Islam- Choudhury, counsel for the Respondent, challenged both witnesses, by putting it to them that if the manager had been speaking to him in the way suggested that one or both of them would have raised it outside the meeting with senior managers. Neither agreed with him. Miss Steinberg stated that it was not her role to do so, although she agreed that she had not done so. The Claimant agreed that he had not taken matters further, but confirmed that he had been upset and distressed in the meeting and both reasserted that they experienced Karen Northover as being aggressive and dismissive.

97. We find that the Claimant was upset and distressed during the course of that meeting, and find that he was unable to speak at times and also find that he was, at points in the meeting, in tears. We find that this was in part because of the scores he had received. We find that they did both experience Karen Northover as being aggressive and dismissive, and that this contributed to the Claimants distress in the meeting.

98. We find that in this meeting Ms Steinberg did explain to Karen Northover both that the Claimant had been getting support from Dorset Wellbeing and explained the Claimants mental health scores.

99. We find that at that meeting, Karen Northover must have realised that the Claimant was upset and distressed and that this was in part because of his mental health. At the least, she was, we find on notice that the Claimant was experiencing poor mental health at that point in time. We consider that, as a senior manager of the Respondent, it was appropriate for her to make some enquiry about his fitness to return to work and in particular about his mental health. She had been shown a letter from the Dorset Healthcare regarding wellbeing sessions the Claimant had attended and she records on the return to work form, that Mr Phillips told her that he was feeling anxious *at the moment*.

100. The Claimant had returned from a period of absence for flu and we find that any manager ought to have asked at this point, why he was so upset and distressed and why he had been at Dorset healthcare and why he required the wellbeing sessions.

101. Mr. Phillips had worked for the Respondent for a very long time. From the evidence we have before us, there is no previous suggestion the Claimant had been upset and distressed in meetings. Any further enquiry about the Claimant's history at this point would have indicated that he had suffered with being stressed and anxious for some time, and that he had reported his concerns.

102. The Respondent knew that he had reduced his contract to achieve a better work life balance, and ought to have realised that his behaviour and demeanour in this meeting was a change from his normal presentation.

103. Following that meeting Mrs Northover wrote to Carol Ivens in HR with the completed return to work form. On this form she has recorded

Richard disclosed that he is feeling quite anxious at the moment and showed me a letter from the well being team at Dorset healthcare confirming…. well being

sessions arranged. Suggested that Richard contacts employee assistance programme which Karen will send and suggested that a referral to Occupational Health. Furthermore Karen to arrange for Dee Lester to carry out an assessment on room 57 and workplace in general

104. .. she goes on to state *following a meeting today with Richard and his colleague Jess Steinberg (for support) find attached a completed return to work form the form details Richards sickness absences in the last 12 months and recommendations. It is also detailed that Richard informed me today that he has been referred to attend a number of well being sessions due to his current emotional anxious situation. moving forward I have recommended the following that Richard accesses the employee assistance programme; that Richard is referred to our occupational health for a full.. . Caroline could you please send Richard details of REAP and arrange for occupational health to contact Richard so an appointment can be arranged*

105. We find that this was appropriate action for her to take at this stage, and indicates that she was aware and that she informed human resources, of the Claimant's state of mental health.

106. The result of this was that the HR department was on notice of the Claimant having treatment in respect of his mental wellbeing and that he was anxious and emotional.

107. An OH referral was made, although we have no evidence from any one about what was said on that referral form.

108. The Claimant was subject to a performance review on 7 March 2018. The Claimant has told us that he felt demeaned at the meeting, and this may have been a reflection of him suffering with stress anxiety and depression at this point, but it does not assist us in assessing the knowledge of the Respondent.

109. On 29 March 2018 the Claimant had a lesson observation and was assessed as good. This was with Alice Copp.

110. The Claimant produced a note he had written, following a meeting with Karen Northover and Sharon Mackett on 7 March 2018, at which he says Sharon Mackett asked him what he was anxious about, and that he explained. We accept that this conversation took place, although we have no evidence of what else may have been said. The Claimant has also recorded and we accept, that he raised the question of a reasonable adjustment in respect of lesson observations.

111. A review of the Claimant by OH took place.

112. We have no evidence of when the referral to OH took place and we have not seen the referral that was made to OH, and do not know what questions were asked. An OH report was produced following a telephone consultation with the Claimant on April 13 2018. This is 2 months after the Claimant met with Karen Northover.

113. The Report states that the referral was made due to concerns regarding his health, and we find that this refers both to his physical and mental health. In this report it is recorded that the Claimant is on medication for diabetes that the Claimant had told OH that his mood is low but his sleep patterns have improved and that he has commenced some counselling and will attend a mindfulness workshop. The report states that he had discussed medication with his GP but this was not an option for him at that time.

114. At the end of the report the occupational health practitioner stated that she had asked if she could contact the Claimant GP but he had not given consent.

115. Following the referral, and before the report was finalised, the Claimant was signed off work by his GP with depression and anxiety. His first sick note runs from the 17 April 2018 and the Claimant did not return to work until October 2018.

116. During that period of time the Claimant provided his employer with a series of sick notes each of which identified that the reason for the Claimant's absence. These sick notes were not originally included in the bundle of documents for hearing which was prepared by the Respondent, but were attached to the supplementary witness statements provided by Tracy Griffin and Caroline Wayment.

117. The first sick note is dated the 17 April 2018 and runs until the 30 April 2018 . It states that the Claimant has a condition of depression and anxiety as a result of which he is not fit for work.

118. The second sick certificate is dated the 26 April 2018 and runs until the 13th May 2018. That certificate refers to condition of moderate depression.

119. The third sick certificate is dated the 10 May 2018 until the 16 May 2018 and refers to moderate depression.

120. The fourth sick note runs from the 16 May 2018 until the 22 May 2018 and refers to moderate depression and anxiety.

121. The 5th sick certificate runs from the 21 May 2018 until the third June 2018 and refers to moderate depression and anxiety.

122. The sixth six certificate which runs from the 1st of June 2018 until the 30th of June 2018 for moderate depression the 7th sick note runs from the 29th of June 2018 until the 28th of July 2018 and refers to moderate depression.

123. The final sick note which runs from the 30 July 2018 until the 29 August 2018 refers to moderate depression.

124. The Claimant states in his witness statement that following his appointment with occupational health, and prior to the report being given to the Respondent, he considered that some clarity was required in respect of some of the detail set out in the report. The Claimant declined to give permission to the occupational health practitioner to contact his GP but

instead stated that he would contact his GP and ask for a letter to be written and provided to occupational health.

125. Whilst this process was ongoing, the Claimant contacted Carole Browne on the 10 May 2018. He wrote two emails on the 10 May at 3.03 pm and one at 10:18pm.

126. In his first e-mail which he copied to Caroline Ivens who worked in HR and to N Jones who we understand was the Claimants union representative, he states *I am communicating via e-mail because at present part of my anxiety and depression makes it very deleterious to my health and well being to use the telephone. For the avoidance of any doubt my GP is in the process of writing formally a letter to occupational health and once OH have received this information they will be able to finalise this report and submit this with my consent to the college. Furthermore having been to the surgery today a fit note has been issued for one week. . .*

127. The same day Carol Browne wrote to Mr. Phillips copying in Carolyn Ivens and Sharon Mackett, asking the Claimant if he could let her know the expected date of his return to work, for planning purposes. She copied the email to Carolyn Ivens,

128. Mr Phillips replied, stating that the fit note covered him until Wednesday 16 May and he had been asked to see his GP on that day to be reassessed.

129. On the 17th May 2018, Mr. Phillips did return to work. He spoke with Carol Browne to let her know that he was returned to work and provided his fit note. The letter from his doctor suggested a phased return to work

130. The Claimant was told that he would not be teaching any classes and was told that he needed to move his work materials and files to the second floor business studies office.

131. The Claimant also attended at a return to work interview on the 17th May at 3:00 PM and was told that the return to work form would be completed the following Monday.

132. In fact, of the Claimant was signed off sick again from the 21 May 2018.

133. On Monday 10 July 2018, the Claimant replied to Sharon Mackett, his line manager, regarding an invitation to attend an absence from work meeting.

134. The Claimant attended at a further assessment with OH on the 10 July 2018.

135. He states that he had attended at an occupational health assessment that morning and that the report from that assessment would be with the Respondent within the next eight working days. He suggested that it made sense for him to meet with the Respondents following receipt of the report so that the contents could be discussed and any recommendations suggested also discussed. He also stated *I am receiving support from a Wellness in work advisor from Dorset mental health forum and would be grateful if she were allowed to accompany me to the meeting. perhaps we can agree a date time and venue once we are in receipt of the report*

136. The Occupational Health report dated 12th of July 2018 was provided to Caroline Ivens, and the Claimant contacted both Sharon and Caroline on the 3 August 2018 asking for a meeting to be organised to discuss reasonable adjustments to facilitate his return to work. He stated that he would be accompanied to the meeting by Ms Miller, his well being advisor from the Dorset mental health forum who had been supporting him. Caroline Ivens replied stating that the meeting would be set up with Sharon Mackett his line manager, once she returned from annual leave. A meeting took place on the 28th of August 2018.

137. The Respondent has not provided us with any notes of that meeting, but the Claimant has provided a note which he made after the meeting, recording his recollections of that meeting

138. We have also heard evidence and had a witness statement from Ms Miller who attended the meeting with him, and we accept her evidence as a true account of her recollections of that meeting.

139. At that meeting the OH report was discussed.

140. The report refers to some helpful briefing information having been provided with the referral to occupational health. Again we have not been provided with a copy of the referral or the briefing information provided by the Respondents at that time.

141. The report records that the Claimant was accompanied to the meeting by his well being at work advisor from the Dorset Mental Health Trust.

142. The report records that Mr. Phillips explained but he had experienced increased levels of anxiety over the last few years and that he had experienced low mood; sleep disruption and tiredness. He had been referred to the steps to well being in February 2018 and he told the occupational health practitioner that at that point he score indicated high levels for anxiety and depression. He then attended 6 counselling sessions and stated that he was currently working on the material provided following those sessions he was receiving support from an employment advisor which was ongoing on a fortnightly basis

143. The report states that Mr. Phillips had self funded a GP report dated the 31 May 2018 and that that report was forwarded on the 5th of June 2018. The occupational health provider confirms that she had seen the occupational health report dated the 13 April 2018; the GP letter dated the 31 May 2018 and correspondence from the 14 April and the 5 June 2018 between the Claimant and occupational health. It is recorded that following the occupational health telephone assessment, Mr. Phillips saw his GP and had been prescribed antidepressants.

144. She records that *he explained that he has found the process very stressful and at that time was very difficult for him to fully understand it given his levels of anxiety and tiredness, given the unsolved work issues and the*

OH process he felt unwell and he felt that the situation caused him a mental breakdown. He ended up being signed off work by his GP since the end of April due to anxiety and stress. The current medical certificate has been extended until 28th July 2018.

145. The report goes on to state that Mr. Phillips explained that with medication and counselling his mental health had improved but he does not feel fully recovered. His motivation is still impaired and struggles with hot environments. His mood has improved but he can get upset when dealing with work issues eg e-mail. He joined a gym and goes three to four times a week he manages his routine at home and maintains his social context.

146. During the course of the consultation the Claimant completed a self reported emotional questionnaire which was the same as the one that had been completed in February 2018 and OH note a significant improvement for scores for anxiety and slightly improved scores for depression. It is stated that the current questionnaire indicated mild anxiety and moderate depression.

147. Whilst this occupational health report does not state in terms that the Claimant had a mental health impairment, we consider that is it implicit from the information provided to the Respondent that this is the case. The Claimant continues to suffer with anxiety and depression despite the fact that he is taking medication and despite the fact that some improvement might be expected with reasonable adjustments in the workplace.

148. The OH practitioner was asked if the Claimant would be covered by the Equality Act. She states that in her opinion diabetes would be unlikely to be covered and goes on to say that the *anxiety seems to be related in a significant proportion to work circumstances and once these are sorted, the symptoms should improve. Additionally, this is a recent diagnosis and with suitable support (Medication and Counselling) he should be able to manager better the condition with mild /moderate impact on his daily/work activity. This opinion might be reviewed should the anxiety become more problematic and impact significantly on his daily activity. However this would required a legal rather than a medical opinion for any definitive statement.*

149. We find that this report, which records that the Claimant is receiving treatment, provides the employer with sufficient information for them to have understood that the claimant had a mental health impairment, and that without medication and other treatment, it had been having a substantial impact of his ability to carry out ordinary day to day activities.

150. His anxiety and stress may have been caused by a combination of the diagnosis of diabetes and work issues such as unannounced lesson observation, having to work in an unventilated room which he found too hot, but the impact on him, was that he had a mental breakdown and was signed off work. He had reported that he found it difficult to understand the process due to stress, and tiredness. The OH practitioner notes that even with medication, his motivation remains impaired, and that he struggles with hot environments and that he gets upset when dealing with some aspects of work via emails.

151. What is clear, we find is that the cause of the Claimant's absence from work was a mental health impairment, which, without medication was more likely than not to have had a substantial impact on his ability to carry out some day to day activities, such as sleeping, and being able to attend at work, and being able to deal with emails. This was the case from the point that he was signed off work in May 2018, at the latest. The report makes clear that the Claimant was continuing to receive various forms of treatment including medication and self-help techniques. It is obvious we find , from the report, that these are having an impact and that as a result, the Claimant was able to manage and his health was improving.

152. The report records that Mr Philips was suffering with low mood and had felt anxious for some time, and that he described unannounced lesson observations as causing him worry and anxiety and that he was losing sleep and was aware that he was displaying symptoms of agitation.

153. The Claimant was signed off work for 5 months. He did not return to work until October 2018. At this point the respondent is, we find, on notice that he has depression and anxiety. We accept that some of the sick notes say moderate depression and anxiety, but we find that at this point there was sufficient information available to the Respondent , from their own knowledge and from the medical notes, that the Claimant was suffering with a mental impairment which was depression and anxiety , and that it was having an effect on him that was more than minor, because he was unable to work.

154. The Respondent had sufficient information that they ought to have known, or could reasonable have been expected to know that the Claimant had a mental health impairment which might amount to a disability, if it lasted 12 months, or if it was likely to last 12 months or recur.

155. Mrs Griffin said she did not see the sick notes but accepted that she knew the Claimant had been absent for a long period of time. She suggested that , even if she had seen them, she would not have realised that he was disabled, since the notes only referred to moderate depression.

156. The point is, that at the stage that Mrs Griffin did the scoring, she was aware of the sickness absence and could have and should have asked questions. The same would have been true for Mr Selman.

157. We have also considered what Mrs Wayment, the senior HR professional, who was responsible for the design and management of the redundancy process knew or could reasonably have been expected to know. We heard evidence from Mrs Wayment on day two of the hearing. She had been appointed in 2017 as Director of Human Resources.

158. Her evidence was that she did not immediately become aware of the Claimants health issues. She had become aware of the Claimant and his health issues following a period of sickness absence which exceeded a few weeks. One of the steps she had taken when coming into post was to put in place various systems for monitoring sickness absence.

159. She accepted that even if she had not seen all the documents on file about the Claimant's sickness record and reasons for sickness absences, that the Claimant had provided a number of documents to the Respondent and the Respondent as an organisation, and the HR department, was aware of them. These included two occupational health reports and a number of items of correspondence between the Claimant and the Respondent.

160. The OH practitioner had, we accept, set out some practical matters which may lead to improvements in the Claimants ability to manage his condition at work, and we note that these were implemented, including that notice of lesson observations would be given and the moving of his office and access to ventilated classrooms, to some extent.

161. We accept that after this report was received the Claimant returned to work on a phased return, following a period of annual leave.

162. We find that Mrs griffins statement that she would not have realised that the Claimant was disabled , after the event and in defence of a disability discrimination claim, addresses the wrong question. The question is whether the respondent could reasonably have been expected to know.

163. We find that she should have made an enquiry, and that any enquiry by her would, on the basis of the information available to HR and on the Claimants file, have led to her being given information which would put her on notice both of an impairment and that it had a substantial and adverse impact on his ability to carry out day to day activities, absent treatment and medication. She, and the respondent officers in HR and other managers, had between them sufficient information we find to draw a conclusion that the claimant was likely to be disabled within the meaning of the Equality Act 2010.

164. They ought reasonably to have known that by February 2019 about the Claimants impairment and its treatment and the length of time it had lasted. This was from April or May 2018 at the least.

165. However, no review of the Claimant had been carried out since the OH referral in the summer of 2018.

166. As stet out in our findings in respect of the redundancy process below, at the point of moderation of those at risk of Redundancy, which was the 19 April 2019, Mrs Wayment, the senior HR professional knew that the marks awarded by both Mrs Griffin and Mr Selman had been negatively affected by the fact of the Claimants 5 months absence. She ought, we find, to have asked questions about this, and considered whether or not the Claimant was a disabled person, who was being disadvantaged as a result of the sickness absence. Again, we find that any investigation at all would have flagged up at the very least, a likely impairment and the likelihood of a substantial impact on the claimant being able to do ordinary day to day activities, and the fact that this may had lasted at least 11 if not 12 months at that point, or that it might well last for 12 months.

167. Even if Mrs Wayment or Mrs Griffin did not have actual knowledge of the Claimants disability at that point, the Respondent was on notice of all the key factors of disability, and any enquiry by either women or any one else in HR, at that point about the reason for the absences and the Claimants health in general, ought to have led to a conclusion that the Claimant was or might be disabled.

168. We find that at this point the Respondent knew or could reasonably have been expected to know that the Claimant had a mental health impairment; that he was receiving treatment including self-help techniques and that he was on medication to treat anxiety and depression and that the combination of these treatments, enabled the Claimant to return to work.

169. We remind ourselves that the question of whether a person is disabled within the meaning of the Equality Act is to be assessed without the benefit of medication and self help techniques. The Respondent needed to ask its self, what would the impact of the Claimants impairment be on him without the benefit of medication. Mrs Wayment confirmed the to the Tribunal that she was aware of this aspect of the Equalities Act 2010.

170. We find that the Respondent knew or could reasonably have been expected to know, once they received the sickness absence notes and then once they received the occupational health report, that the Claimant had the impairment of both depression and anxiety and knew or could be reasonably be expected to know that it had a substantial adverse impact on his ability to carry out ordinary day to day activities.

171. We find that the Respondents had sufficient information about the Claimant's condition at that point and about the condition that the Claimant had been suffering with from April 2018 at the latest, to realise that by the time the Claimant returned to work in October 2018, that he had been suffering with a mental health impairment which had the substantial adverse effect on him for at least six months.

172. At that point we accept that the Respondent did not have any specific information telling them how long the Claimant's condition would last.

173. The question which we have to consider is, could they reasonably have been expected to know that the Claimants impairment and its impact on him would last 12 months or may recur? Was it likely that the Claimant's condition would last 12 months?

174. What the Respondent did know was that the Claimant had the condition ; that he was receiving treatment and that the condition was being managed with treatment.

175. We observe that a reasonable employer managing a Claimant returning to work in these circumstances might have been expected to put into place some form of review both of the adjustments which were being made and of the Claimant's own well being. This Respondent did not do that.

176. Nor did they consider at any point in the redundancy process, even once it was clear that his significant period of sickness absence had impacted upon

his scores to his detriment, whether or not his impairment and its effects had lasted or would be likely to last 12 months.

177. We find as fact that, had they made any inquiries during the period of time from October 2018 until the point of the selection of the Claimant for redundancy and up to the date of his dismissal, they would have been told that the Claimant continued to take medication to manage his mental health impairment.

178. We find on the balance of probabilities, on the basis of the information available to them that they would have known or could reasonably have been expected to know that the Claimants impairment could well last for a 12 month period, and that it could recur.

179. We have heard no evidence from the Respondent that anybody ever asked the Claimant about his health and his treatment after he returned to work or that anybody from the human resources department or anywhere else ever asked anyone to consider whether or not the Claimant was disabled by reason of anxiety and depression.

180. This is despite the Claimant raising an appeal, at the end of which he states that he considers he is disabled.

181. Our conclusion is that had they done so they would on balance of probabilities have been bound to conclude that the Claimant was at the point both of the scoring and the point of the moderation and at the point of the appeal and therefore the decision to dismiss him a disabled person within the meaning of the 2010 Equality Act.

The Respondents redundancy process

182. Although the respondent has conceded that the dismissal was unfair, we make the following findings of fact about the chronology of events because they are relevant to the question of the timing of knowledge, and because they are relevant to the question of how the claimant would have been treated

but for the discrimination. This is relevant to the issue of remedy which is still to be determined.

183. On 6 March 2019 the Claimant attended a consultation meeting at which he was notified that he was at risk of redundancy. The Claimant was told that the College was looking to reduce functional skills and GCSE lecturers within the English and Maths department by five FTE posts. 2 ½ full time equivalent posts were to be deleted from the English provision and 2 1/2 posts from the maths provision.

184. The Respondent states and we accept that prior to this announcement there had been consultation with the recognised unions, and various meetings had taken place about the method for selection. We accept the evidence from Mr Edwards and Mrs Wayment, that the college met with union reps on several dates and we have been referred to the notes of the various meetings about this process. We find in particular that there was discussion about the matrix for selection, and the scoring of staff within that matrix.

185. We find that the process of consultation and the process of design of the scoring matrix and the process put in place for the individuals in each pool to be scored was a fair and reasonable one. The unions were informed of the need to make redundancies and were consulted about the suggested method for selecting staff to be placed at risk of redundancy.

186. As a result of discussion, it was agreed that a scoring matrix would be used to rank employees according to a number of factors and following consultation with the union, some changes were made to the matrix and the criteria.

187. Firstly, the use of sickness records as criteria was removed, and secondly the unions' request for the staff themselves to be able to contribute to their final score was agreed.

188. The Claimant states that he was told that he was in a pool of 9 people who taught English, from which the 2.5 posts for redundancy would be selected.

189. He was told, along with all other staff, that the selection would be made according to a scoring matrix, which would be scored by three people. He would score himself, then two managers would also score him. There would then be a moderation process, and the selections made according to the resulting scores.

190. As part of the process, the Claimant was provided with a page of guidance, which set out the criteria against which each person would be scored. The guidance set out the precise score which would be allocated in respect of each aspect of each criterion, and also gave the weighting each criteria. The score given was to be multiplied by the weighting, to give a final score on each criterion.

191. On the face of it, there was no room for discretion, as the criteria required the scorers to identify whether or not an individual either had the skill, qualification or knowledge or did not have it, and score them accordingly.

192. Some of the skills set out were not applicable to the teaching of English, and we accept that, although the Claimant scored himself in respect of some of those matters (Such as the ability to teach the apprentices) the managers did not score him or any other individual for these criteria. There was no unfairness in the scoring in this respect, although there was a lack of clarity in the guidance.

193. Each employee in the pool would be scored by themselves, and then by two managers. The managers would either be line managers or the learning directors. In the Claimant's case his matrix scoring and that of others in his pool was carried out by Barney Selman and Tracey Griffiths. Mrs Griffiths gave evidence to the ET, Mr Selman did not.

194. The people in the pool were all asked to submit their own scores which they did. The Claimant scored himself according to his understanding of the criteria and the factors within each, and his knowledge of his own skills and abilities and achievements.

195. The Claimant was then scored by the two individuals, and the Respondents state that this was done independently.

196. The two scorers had the guidance; the matrix and the Claimants own scores as well as access to the college N drive, which held all the individuals' personal files. These files contained the Claimant's timetables, so that the scorers could see what the Claimant and others were teaching and when, and which age group and level they were teaching, and therefore the skill set. The N drive also gave access to PsR forms and lesson observations.

197. All other employees in the pool were also scored by the same two individuals. The next stage was to add up the scores. This gave a ranking of the highest scoring and the lowest scoring individuals.

198. The next stage was a moderation of the scores. Moderation meetings were set up and Tracey Griffin attended with Caroline Wayment from HR. Mr Selman was not involved at all.

199. There was no guidance given either to the managers involved in moderation, or to employees, about the process and discussion that would take place at these moderation meetings. The Respondent witnesses described a discussion about the process followed in reaching the marks for each candidate, but did not suggest that there was any interrogation of the reason why the marks were given at the level they were. Mr Selman took no part in the discussion at moderation, and Mrs Wayment did not challenge any of the decisions about why marks were allocated as they were to certain individuals.

200. The guidance states as follows:

Performance records: [please use in conjunction with the last full year PsR ie 2107/18.

If the individual has not been observed this academic year, please refer to last year.

4 targets =5

3 targets=4 points

2 targets=3 points

1 target=2 points

0 targets -1 point

Multiply by weighting x 2.

NB If an individual has been had significant absence(sic) for what ever reason (ie maternity/absence etc) this will be reviewed on a case by case basis at the moderation meeting.

201. The number of targets met was therefore an important part of the score, and was based upon the expectation that everyone would have been through the process.

202. The reference to absence was important to Mr Phillips, because he had been absent for 5 months, and because his PsR had not therefore been completed.

203. Whilst the guidance referred to absence, and to addressing any issues at the moderation stage, it does not say how this would happen, or what adaptions or adjustments to scoring might be made. From the evidence we heard, we find that there was no process agreed with the trade unions, or with managers as part of the consultation or at any other time.

204. Neither Mrs Wayment , the head of HR or Mrs Griffin, had given any thought to what this meant in practice before they met to discuss the scores of those in the pool for English and Maths.

205. We find that the result or consequence of this vague statement in the guidance and lack of consideration of what it meant, was that a person who had been absent, and whose scores were affected, or whose PsR had not been completed for example, like Mr Phillips, did not know how they would be scored. Neither we find, did the scorers. We find that what happened in practice, was that the three people involved, Mrs Griffen, Mr Selman, and Mrs Wayment at the moderation stage, all had to decide at the time how to score Mr Phillips.

206. They had to determine whether and if so what adjustments, if any, to make to the scoring of an individual and to determine how to do that. There was no discussion about how this would be done, or what would be taken into

account, and no discussion that we heard evidence about in respect of the potential discriminatory impact of this part of the process.

207. At the moderation stage therefore, the score of any person who had been absence was dependent upon the HR director and the one scorer, Mrs Griffin, taking into account the absence and reviewing the scores.

208. Mrs Wayment told us that she had asked about the Claimant's sickness absences and the impact on marking.

209. She told us and we accept her evidence that Mrs Griffin told her that no scores had been allocated to the Claimant in respect of achievement, retention or recruitment because there was no information on the relevant PsR sheets. This was because of his sickness absence. Mrs Griffin accepted that she knew the claimant had been absent on sick leave. No other information had been looked at, and no enquiries made about the sickness absence and no information provided by HR about it. No consideration had been given about whether there was a need to make adjustments to the process and if so how to make the process fairer for Mr Phillips, despite the fact that he had taught at the respondent College for 25 years, and was clearly disadvantaged by this process, to the extent that he was selected for redundancy.

210. Mr Selman, apparently independently, had given the exact same score to the Claimant. He did not attend to explain his scoring, and there is no information available about why he did what he did at the time. We conclude on the basis of the information we have, that his reasons were the same as Mrs Griffins, in so far as they arose from the Claimant's sickness absence. Mr Selman had known the claimant for a number of years and had been involved as set out below in various discussion and meetings with him about his health and his work.

211. We find that both Mr Selman and Mrs Griffin and Mrs Wayment must have realised that the result of the failure to allocate any score at all to Mr Phillips, because of the effect of his sickness absence, was that he would be selected

for redundancy, whereas he may not have been, if scores had been allocated to him on some other basis.

212. The moderation process was we assume, intended to ensure that scoring was done fairly and without discrimination. However, in this case, we find that Mrs Griffin and Mr Selman both decided on a method of scoring Mr Philips which was significantly disadvantageous to him. The Respondent now concede that it was unfavourable treatment and for a reason arising from his disability.

213. We have therefore considered the Claimant's own score, the scores he was allocated by Mrs Griffin and Mr Selman , and what happened at moderation.

214. He awarded himself 4 x 2 points in respect of the section overall, but made a total of 12 points. The maximum points that could be awarded here were 10, on the basis of 5 points being awarded of all 4 targets were met, with a weighting of x2.

215. The Claimant considered that he had met all of his targets in respect of each of the matters set out, in the previous year, and more generally that his targets as set for the year in question, indicated both that he had met targets previously and that he would meet them in the future.

216. The Respondents did not specifically address his score within their evidence. The Claimant was cross examined on his own assessment of his score. Whilst the documents in respect of the PsR in the bundle do not assist us, we accept the Claimant's evidence that there were other documents which showed he had met targets in the past. We also accept his own assessment of his ability, from the information we have before us. He had 25 years experience and we note that there had never been any issues with his performance, until he became disabled and had started to suffer with anxiety and depression. He had returned to work after the 5 months absence and following a phased return he had, on all accounts continued to teach appropriately and to standard. We accept there had not been an assessment and accept that the Claimant had been moved from one class because of a

disruptive student, but nothing we have heard to have been referred to suggests to us other than that the Claimant was doing his job as required.

217. We find that the basis on which the Claimant assessed his own score was a fair one, and that it was a realistic and sufficiently objective reflection of his achievements during the time that he was at work in the recent past. We find that his calculation was wrong, but that if he had got that right, he would have been justified in awarding himself 10 points, which was the maximum in this part of the scoring.

218. We heard evidence from Mrs Griffin, and she confirmed that that she awarded no points for the student achievement; student retention or student attendance and only awarded 2 points to the Claimant because he had had a good lesson observation. She told us that she thought she was being kind to him, because she looked at a lesson observation which suggested he had not been good, and that therefore she adjusted this score upwards, to balance out the lack of data in any other areas.

219. We find that at the moderation meeting, Mrs Wayment was told the reason for the lack of points and that she ought to have realised that this was incorrect scoring. We also find that as an HR director, and on the basis of our findings in respect of knowledge, that she knew or could reasonably have been expected to know, on making reasonable enquiries, that the Claimant was or was likely to be a disabled person, and that therefore she ought to have realised that this was potentially disability discrimination. We find as fact after hearing her evidence and the evidence from Mrs Wayment, and note the Respondent's concession in this respect, that the reason why no points were awarded was the Claimants sickness absence and that the lack of data arose from that absence and the associated lack of review.

220. Whilst the Respondent has made concessions about the cause, these findings remain of importance because of the timing of that concession. Had the discriminatory impact been recognised and addressed at the moderation meeting, when it ought to have been addressed, the outcome for the Claimant would have been different.

221. We find that any reasonable employer operating reasonable process would have identified this as an issue and addressed it at that point.

222. Neither Respondent witness stated in their witness statements or their supplementary witness statements, that this discussion had taken place, and nor did they set out the reason why the Claimant was allocated the scores as he was.

223. The amended grounds of resistance, filed by the Respondent on 1 July 2020, states at paragraph 22(d) as follows in respect of the scoring:

The Claimant was scored objectively and reasonably in the matrix process which was then calibrated through a moderation process. The moderation process took into account reasonable adjustments for disability. The Claimant scored poorly against others in the pool which led to his selection for redundancy.

224. At para 30 it states that*, the Claimant was on sick leave for the whole of September 2018. The Claimants performance was assessed using his personal review appraisal and for performance during the period October 2018 to March 2019. It is contended that the Claimant suffered no material disadvantage by being assessed over a period of six months as opposed to seven months for colleagues*

225. No explanation has been given to us as to why the Respondent asserted a basis of scoring which was not supported by the witnesses who carried out scoring and from whom we have heard sworn evidence.

226. We had no evidence before us as to why Mr Selman had scored the Claimant at 2 points. He took no part in the Moderation, but we have no evidence that he ever raised any concern about the impact of the Claimant's significant absence in his scoring of the Claimant.

227. Mr Selman knew that the Claimant had suffered with stress in the past. We infer from the evidence we have heard, and the scores he gave, that he knew that the claimant had been absent on sick leave.

228. We have considered what score might have been awarded, had the fact of the Claimants disability related sickness been acknowledged at the time, and dealt with by way of an adjustment to the basis for scoring, as the guide anticipated.

229. We accept the Claimant's evidence in respect of his 25 years experience and his abilities as a teacher and his achievements. We find that his own score in respect of performance was a fair assessment of his own abilities. We find that in any fair scoring system, and on the basis of the Respondent guidance, a score ought ot have been reached on the basis of other records or information.

230. Mrs Griffin and Mr Selman did not do this, but had they done so fairly, and with proper guidance from HR, about disability discrimination, reasonable adjustments and discrimination for a reason arising from disability, we find that the Claimants own score would, on balance of probabilities, have been the most likely score that each would have awarded.

231. We therefore find that the score the Claimant would have been awarded, but for this discrimination, would have been a score of 10 points from each scorer, giving him a total of 20 points, rather than the total of 4 points he actually received.

232. This is a difference of 16 points.

233. We have also looked at the fairness of the scoring in other respects, bearing in mind that the Respondent does now concede that the Claimant was unfairly dismissed because of the unfair process of scoring and mistakes that were made at the point of scoring as well as the later failure to offer him the suitable alternative employment which was available as a result of the resignation of Mrs Lewis. (See post) .

234. We had evidence before us that the scoring carried out by Mrs Griffin and Mr Selman, in respect of relevant knowledge and experience, disregarded

experience the Claimant had of teaching Adult classes. The reason both scorers wrote on the forms was that adult classes had been allocated to the Claimant due to *issues in study programme classes*(Mr Selman) and Adult session added to time table due to 16-18 class issues(Mrs Griffin)

235. We were surprised that both scorers had reached the same conclusion that scores should not be awarded to Mr Phillips because of how his experience of teaching the class was gained, because there is no indication anywhere within the guidance or within the process agreed with the trade unions, that the reason for an individual gaining any experience was a relevant factor, when assessing whether or not the person had the experience.

236. No one disputed that Mr Phillips had taught the adult sessions. They were, as Mrs Griffin wrote, *added to his timetable*.

237. We find that in the absence of any specific criteria for disregarding experience gained through timetable changes, or re allocations of work, that the Claimant should have been scored in respect of this experience. We accept his evidence that he had it on his timetable and that he taught it, as being sufficient.

238. The reason why the Claimant was allocated this teaching, arose, we find from him being allocated a class in which there was a particularly difficult student who caused disruption and difficulties in the class.

239. It has not been suggested by anyone that Mr Phillips was failing to deal with the matter or was himself at fault, but a decision was taken to move him from teaching the class and he was reallocated a different class, which was teaching adults.

240. We find that this approach to the Claimants scoring was wrong and ought to have been identified by the HR expert at the point of moderation. The Claimant's own score was again higher, and was, we find, in that respect the correct score. Any form of basic interrogation of scores would have identified

that an error had been made which disadvantaged Mr Phillips. This was procedurally unfair and ought not to have happened.

241. The failure of the two scorers to allocate him the correct score, and their joint willingness to take into account an irrelevant factor, suggests to us that both scorers had a reluctance to credit the Claimant with expertise and experience which he had gained.

242. On the 29 April the Claimant attended a meeting with Mrs Griffin and his union Rep. He was told that he would be made redundant. Another colleague was also selected for redundancy.

243. During the meeting the Claimant was provided with a score which had been given by the two individuals who carried out the marking exercise.

244. It was unclear to the Claimant who had undertaken this scoring.

245. The Claimant was concerned at the scoring, and in particular, considered that his scoring for performance was particularly low, and assumed that this was because it had been based on the previous year when he has had significant sickness absence.

246. In that meeting the Claimant was given formal notice of redundancy and given the termination date of the 31 July 2019.

247. The Claimant appealed his redundancy, and an appeal meeting was held on 19 June 2019, chaired by Michael Johnson, finance director.

248. The Claimant asserts, and we find as fact that following notice of termination by redundancy, but before that date of his dismissal, another member of staff resigned. He states that he was not informed of a vacancy and asserts that this might have been suitable alternative employment for him. We find it would avhe been and the respondent concedes that it ought to have been offered to him. We find that if offered the post , he would have accepted it.

249. This was the result of a colleague, Miss Lewis, who was in the English pool of 9 with Mr Philips, who had not been selected for redundancy, and who had not opted for voluntary redundancy, deciding that she would resign. She was a full time Equivalent, and the post left vacant by her resignation, meant there was a job which was suitable and available, and which could have been offered to the Claimant.

250. The decision not to offer that post was made, we find, by the executive, but we find that the decision was strongly influenced by the views of Mrs Griffin.

251. Her evidence to us about this post was extraordinary. She asserted that she considered that the post should be left vacant in case Miss Lewis changed her mind, and suggested that her resignation may have been the result of the Claimant causing Miss Lewis to feel guilty about not being made redundant. This was not, she confirmed, ever discussed with Miss Lewis, and was not a matter about which there was any other evidence. She had no reason we find, to believe this. We find that in the maths department, similar resignations after the selection process did lead to those individuals at risk of redundancy being offered posts and not being made redundant. There is no valid and reasonable explanation given in evidence for the Respondent not having followed the same process in the English department with Mr Phillips.

252. We heard evince from was Mr Johnson, who had conducted the appeal meeting.

253. In advance of this meeting, the Claimant had submitted his grounds of appeal. We were referred to these.

254. The Claimants appeal was based on the method of scoring him and the scores allocated to him.

255. He was represented by his union representative Mr Edwards, who gave evidence to us about the process in general and the appeal hearing he attended with Mr Phillips.

256. We find that prior to the appeal, the Claimant and his union representative and the Union more widely, made a number of requests for further information about the process and the scoring of all those in the pool for redundancy.

257. No further information about the reasons for allocating the Claimant the scores that he had received were provided to him. This meant that he was not able to understand why he had been allocated scores by his managers which were significantly different to his own scores.

258. We have made findings of fact about the scores he was allocated and the errors made by Mrs Griffin and Mr Selman in respect of his scores. The evidence before the ET supports a conclusion that the Claimant would have been scored higher had he not been absent on sick leave, and had the two managers not used their own discretion over the allocation of scores in respect of his current teaching.

The appeal

259. The evidence of Mrs Griffin was that the meeting she had with the Claimant was simply to inform him of the outcome of the process and the decision to select him for redundancy. She did not consider that it was appropriate for her to discuss with the Claimant at all, either the methodology of the scoring or the process of moderation. She told the tribunal that she considered that if the Claimant had wanted to discuss these matters he could have made an arrangement to meet with her on another occasion, or that he could raise his questions on appeal.

260. The Claimant did notify the Respondent that he wished to appeal and on the 8 May 2019 Caroline Ivans wrote to him asking for his grounds of appeal and inviting him to appeal hearing to take place on Monday the 13 May 2019

261. The Claimant wrote back to Caroline on the 10 May 2019 attaching a Word document, in which he set up his grounds for appeal.

262. In that letter the Claimant stated that he was currently signed off by his GP with a fit note and was deemed unable to work until the 14 May 2019, Therefore, would not be able to attend a hearing on the 13 May 2019. He went on to state that he wished to lodge an appeal to the issuing of a redundancy and *this is due to concerns detailed below regarding the scoring on the matrix by the manager and the AP and anomalies therein the process appears flawed in many respects*.

263. Next the Claimant set out the information he required from Human Resource in order to hopefully work through *the current obfuscation*.

264. He states *the whole process requires clarity and meaningful data to fully and truly comprehend how these schools and this outcome has been reached I have concerns with regard to the process of redundancies as in the meeting held with Tracy Griffin and Sharon maquette and Martin Edwards UCU local branch representative*

265. The Claimant requested minutes of the meeting at which he had been informed that he was selected for redundancy and asked for electronic copies of the letter; a copy of the script which Mrs Griffen had read from at that meeting; minutes of all meetings held to date in the process, including those held to inform the member of staff that their post was redundant; to identify who was involved in the process; when the meeting was held; the matrix scores and comments to substantiate, support and explain the scores given by those involved in the process to those subject to the possibility of redundancy, not just those being made redundant; the anonymous scores of others involved in the redundancy pool.

266. He then states *these documents form the basis of my appeal primarily the process its anomalies and the scoring awarded by the manager ,who was this ?and the AP who was this? surely the minutes of the meeting will identify*

exactly the individuals and their roles there scoring and there clear reasons for the marks awarded in this process ., .-

267. We find that it was crystal clear from this letter that the Claimant wanted information that would explain to him how he had been scored by both people and the reasons for the scores awarded to him.

268. He then states *as you are aware it is on record with HR that I live with both diabetes and anxiety and depression having been referred to OH and a report published and held on file detailing the conditions and how they impact on my work life and well being, therefore I would reiterate the whole process of redundancy has had a deleterious impact on my wellbeing and exacerbated my health issues. I have had to take time before I have been able to respond and work towards lodging an appeal .*

269. We find that this statement flagged up to human resources and to Mr. Johnson, who received this document prior to hearing the Claimants appeal, that the Claimant might have a disability because of anxiety and depression.

270. Prior to hearing the Claimants appeal, Mr. Johnson was sent a variety of information. He set out at paragraph 21 of his witness statement what he received and we accept his evidence in that respect.

271. On the 13 May Mr. Edwards copied Mr. Johnson into an e-mail he was writing on behalf of three union members, one of whom was the Claimant. All three union members were appealing the decision to make them redundant because they did not feel the matrix selection procedure had been fair. Mr. Edwards stated that primary concerns arose in respect of the matrix scoring not having been moderated properly. Mr. Edwards requested information about the moderation process

272. Whilst we accept that Mr. Edwards was the Claimants trade union representative, the Claimant had set out very clearly in his appeal letter the basis on which he was appealing. We find that Mr. Johnson can have been in no doubt that the Claimant wanted to know why he had been scored, as he

had been, and this was a matter which needed to be considered at the appeal hearing.

273. On the 16 May 2019 Caroline Wayment replied to Mr. Edwards with a copy to the Claimant and gave an explanation of the scoring process. She did not explain how individual managers had reached the decision about individual scores but rather stated that the process was undertaken independently by two individuals and was then followed by internal moderation. This was a description of process and did not provide the Claimant with the information he had requested.

274. Mr. Johnson told us, and we accept, that he requested information about the moderation process and spoke to both Caroline Wayment and Diane Graham, who was the Principal and Chief Executive Officer, to establish what happened at the moderation meetings. He asked for a document to be supplied to affected employees and their representatives.

275. Mr. Johnson then received an e-mail from Diane Graham setting out what she believed the process to have been.

276. She made reference to the three scores per individual, one from the relevant learning manager, one from the director of learning and one from the individual themselves. she states the sheet shows the three scores totalled, but also states that this total score was not used in the process and with hindsight should not have been included on the sheet as she says it caused confusion.

277. We find that in reality it had been anticipated that the three scores would be totalled up and that it was only at the point of moderation and only in respect of the pool for English that a decision was made to disregard the individuals own scores.

278. Finally she said that to clarify the process at the moderation meeting the panel compared the scores from managers with the scores from the individual and in particular if there were any significant discrepancies between their

scoring and that submitted by the individual where this debate led to changes score this was noted on the individual score sheet once this was completed for each individual decisions about selection for redundancy were made based on the revised scores.

279. Diane Graham then included a paragraph that *I was present at all moderation meetings*. She was writing the note for Caroline Wayment.

280. Mr. Johnson raised a concern about this last part because he had information which suggested that Caroline Wayment had not in fact been present at all meetings.

281. We find that this exchange was an attempt to explain the process but find that it indicates that even at the stage of appeals, there was no agreement between the Respondent officers as to what had happened at moderation or the process that had been followed. Nor was there any willingness to investigate whether or not the Claimant might be correct, that he had been scored unfairly.

282. The description of the process provided to Mr. Johnson prior to the appeal meeting with Mr. Phillips is not the same as the explanation provided by Mrs Wayment and Mrs Griffin to this Employment Tribunal.

283. We have been provided with no explanation at all as to the reason for the lack of clarity and the failure to provide a straight forward explanation either to the Claimant or to Mr. Johnson, about precisely how the Claimant was scored and how the scores were moderated.

284. We find that the moderation process was ineffective. Nothing was done to interrogate any scores allocated to the Claimant and there was no moderation by considering the differences between his scores and the scores that his managers had reached. Any enquiry of Mr Selman or Mrs Griffin or Mrs Wayment would have shown this.

285. The Claimants appeal hearing took place on the 19 June 2019. the Claimant was given an opportunity to explain his grounds for appeal in more detail.

286. At the outset of the meeting Mr. Phillips noted that adult provision had been added but that he had self scored for his experience taking an honest approach.

287. About 20 minutes into the meeting Mr. Johnson gave the Claimant the note which had been provided by Mrs Wayment, which had in fact been written for her. The Claimant was given 15 minutes to review that document and the meeting then continued.

288. At the end of the meeting the Claimant told Mr Johnson that he had been bullied and threatened and intimidated by a number of members of the Respondents staff; that he felt victimised and targeted and believed that he was covered by the Equality Act. He also stated that he had not raised the matters because he had not felt able to do so that he had just tried to cope and said *I am on medication I was wary of the consequences.*

289. Mr. Johnson was on notice that the Claimant had a health issue because he knew the Claimant had been signed off sick. He also now knew that the Claimant considered he was covered by the Equality Act and that the Claimant was on medication.

290. We find this stage that the most cursory of discussions between Mr. Johnson and Mrs Wayment and any other member of the human resources staff would have put them on notice the Claimant was likely to be a disabled person within the meaning of the Equalities Act and that since he was still taking medication, that his impairment may have lasted for at least 12 months.

291. Mr. Johnson stated that there were a number of matters that he needed to investigate and he told the Claimant that he would provide his decision after he had done that.

292. We find that following that meeting Mr. Johnson did seek some further information but that he did not ask any questions about the way in which the scores have been allocated and nor did he seek to investigate whether the points made by Mr. Phillips were justified or not. He made no enquiry at all about the Claimants health.

293. Since both Mrs Wayment and Mrs Griffin knew that the Claimant's sickness absence had affected his scores, we consider that any inquiry ought to have revealed this fact and in the light of the information provided by the Claimant at the appeal at least ought to have raised serious concerns with Mr. Johnson about the fairness of the process.

294. We also find that at the point of the determination of the appeal the Respondents knew or could reasonably have been expected to know that the Claimant was a disabled person.

295. Mr. Johnson did not investigate the questions raised by the Claimant and instead simply dismissed his appeal.

296. The questions asked by the Claimant and his representative ought to have led to an explanation being given to the Claimant about the information used to score him, and the reasons why the managers scores were so different from his own.

297. The Claimant and the Claimant's union representative were cross examined about what they had asked and what they had said, and it was put to them that, had their believed that Mr Phillips had been discriminated against in the process, then they would have said so at the time. The witnesses agreed that this had not been said, but both Mr Phillips and Mr Edwards expressed the view that they could not form any view about the fairness of the process, because they did not know how the scoring had been done. We agree.

298. The Respondent had a responsibility for to carry out a fair and transparent process, and part of any fair appeal process must be the provision of

information to an appellant, where it is requested, about the process followed to reach a score which places the Claimant at risk of redundancy.

299. If there is an error, or a discriminatory score, the Claimant can only challenge it if he is given the information, and the person hearing the appeal can only correct the error, if he asks questions about the process.

300. The appeal ought to have been an opportunity for the Claimant to raise and discuss these matters, and ought to have been an opportunity for Mr Johnson to examine the scores themselves to see if there had been errors made. He did not do this.

301. We find that Mr Johnson was concerned about the process. He considered that there were flaws, and he was unsure about the way that moderation had taken place. He therefore made some enquiries prior to the appeal hearing with Mr Phillips.

302. The Respondent conceded, at the point of submissions, that it could not defend the fairness of the process, and that there was suitable alternative employment that the Claimant could have done, and that it had, therefore unfairly dismissed the Claimant,

The relevant legal principles

303. The Respondent has conceded that it unfairly dismissed the Claimant both because of its procedure and because there was suitable alternative employment available. we do not therefore set out the law in respect of unfair dismissal or suitable alternative employment.

304. In respect of disability the Respondent concedes that the Claimant was a disabled person by reason of both the disabilities relied upon and that it had knowledge of the Claimant's diabetes as a disability. The Respondent has also conceded that it applied the PCP relied upon by the Claimant for the purposes of a reasonable adjustments claim, and that it knew or could have

been expected to know that the PCP would substantially disadvantage the Claimant as a disabled person.

305. The Respondent also concedes that the failure to award the Claimant any marks because there was a lack of data because he had been absent on sick leave, , was something which arose in consequence of his disability, and is unfavourable treatment for reason arising from disability.

306. We have not therefore set out the law in respect of any of these matters since the findings of fact we have made are not determinative of these issues.

307. The only legal principles we have had to consider in order to determine the disability discrimination claims , are in respect of knowledge.

308. Did the Respondent know, or could it reasonably have been expected to know, that the Claimant was a disabled person within the meaning of the Equality Act 2010 at the material times.

Knowledge of disability

309. An employer has a defence to a claim under S.15 EqA if it did not know that the Claimant had a disability , under S.15(2). This stipulates that subsection (1) does not apply if the employer shows that it 'did not know, and could not reasonably have been expected to know' of the employee's disability.

310. We were referred by respondent counsel to the case of *A Ltd v Z 2020 ICR 199, EAT*. At paragraph 38-40 of her judgement Judge Eady QC states as follows:

A Respondent will avoid the liability that would have otherwise arisen under section 15 of the 2010 act if it can show that it did not know and could not reasonably have been expected to know of the complainants disability. A finding that the Respondent does not have actual knowledge of the disability is thus not

the end of the tribunals task, it must then go on to consider whether the Respondent had what(for shorthand) is commonly called constructive knowledge;, that is whether it could, applying a test of reasonableness-have been expected to know, not necessarily the Claimants actual diagnosis, but of the facts that would demonstrate that she had a disability- that she was suffering a physical or mental impairment that had a substantial and long term adverse effect on her ability to carry out normal day to day activities.

39. as to what a Respondent could reasonably have been expected to know, that is a question for the employment tribunal to determine. The burden of proof is on the Respondent, but the expectation is to be assessed in terms of what was reasonable; that, in turn, will depend on all the circumstances of the case

311. We reminded ourselves that where knowledge of disability is disputed by the employer, as in this case, under either section 15 or section 20 of the Equality Act 2010, that it is for the employer to show that it was unreasonable for it to be expected to know that the employee suffered an impediment in his mental health, which had a substantial long-term effect . The question of reasonableness in this context is one of fact and evaluation which we must assess objectively and coherently taking into account all relevant factors and ignoring irrelevant. We also reminded ourselves that we must consider what information the Respondent might have been provided with had it made enquiries of the Claimant at particular times in the chronology. We remind ourselves that we must balance the likelihood that any further enquiries by the respondent would yield information about the alleged disability against the dignity and privacy rights of the employee .

312. We have also borne in mind that an employer cannot simply turn a blind eye to evidence of disability. While the Equality Act 2010 does not impose an explicit duty to make enquiries about the claimants possible or suspected disability, we remind ourselves that the EHRC Employment Code states that an employer must do *all it can reasonably be expected to do to find out whether a person has a disability* (see para 5.15).

313. It suggests that 'Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example,

not all workers who meet the definition of disability may think of themselves as a "disabled person"' — para 5.14.

314. We have also reminded ourselves of the guidance in the code in respect of knowledge of a disability held by an employer's agent or employee — such as an occupational health adviser, personnel officer or recruitment agent. This knowledge will usually be imputed to the employer (see para 5.17).

315. In particular, we have borne in mind he Court of Appeal's decision in *Gallop v Newport City Council 2014 IRLR 211, CA* (a case considering reasonable knowledge under S.4A DDA). In that case G complained of workplace stress and was referred to two occupational health advisers engaged by his employer. They both expressed the opinion that he was not disabled for the purposes of the DDA. An Employment Tribunal rejected G's subsequent claim of a failure to make reasonable adjustments, finding that the employer could not reasonably have been expected to know that G was in fact disabled (he suffered from clinical depression). The EAT upheld that decision on the basis that the employer was entitled to rely on the advice given by the occupational health advisers. However, when the case progressed to the Court of Appeal, Lord Justice Rimer stressed that the key question is whether the employer had actual or constructive knowledge of the facts constituting the claimant's disability: it was an error of law for the tribunal to allow the employer to deny relevant knowledge by relying on its unquestioning adoption of occupational health advice. Rimer LJ rejected the notion that an employer can simply 'rubber stamp' an occupational health adviser's opinion. Instead, it must make its own factual judgement as to whether the employee is disabled.

316. In this case we have therefore considered the information available to the claimant's managers, who were Barney Selman and Tracey Mackitt, the information available to Karen Northover, who was also a manager, the information provided by the claimant to Carol Brown and Carolyn Ivens, both of whom worked within human resources, as well as the information provided to occupational health practitioners and other individuals, including Mrs Griffin, Mrs Wayment and Mr Johnson.

317. In respect of the question of knowledge, and specifically in respect of the information that an employer might reasonably have been expected to receive, had enquiries been made , Mr Islam Choudhury for the respondent placed particular emphasis on paragraph 23 of the judgement in *A Ltd v Z 2020 ICR 199, EAT*, by. We have taken them into account when making our findings of fact and drawing the conclusions from them.

318. These can be summarised as follows;

a. it is actual or constructive knowledge of the disability itself and not the causal link between the disability and its consequent effects which led to the unfavourable treatment that is required
b. the Respondent does not need to have constructive knowledge of the complainants diagnosis. However ,it is for the employer to show that it is unreasonable for it to be expected to know that a person a suffered an impediment to his physical or mental health or be that the impediment had a substantial and see long term effect.
c. The question of reasonableness is one of fact and evaluation, and must be adequately and coherently reasoned and must take into account all relevant factors and not take into account irrelevant factors when assessing the question of constructive knowledge an employee's representations as to the cause of absence or disability related symptoms can be important this is because in asking whether the employee has suffered substantial adverse effect the reaction to life events may fall short of the definition of disability for the Equality Act
d. the approach adopted to answering the question is to be informed by the EHRC code, which notes act 5.14 it is not enough for the employer to show that they did not know that the disabled person have the disability they must also show that they could not reasonably have been expected to know about it employers should consider whether a work has a disability even where one has not been formally disclosed.
e. when making enquiries about disability employers should consider issues of dignity and privacy and sure that and ensure that personal

information is dealt with confidentially it is not incumbent upon an employer to make every inquiry where there is little or no basis for doing so

f. reasonableness for the purposes of section 15 two must entail a balance between the strictures of making enquiries the likelihood of such inquiries yielding results and the dignity and privacy of the employee as recognised by the code

319. When the Unfavourable treatment complained of is made up of a series of distinct acts occurring over a period, albeit a short period ,it is necessary to consider not only whether the employer had the requisite knowledge at the outset but also, if it did not, whether it gained that knowledge at any subsequent stage when the treatment was ongoing.

320. For example, in *Baldeh v Churches Housing Association of Dudley and District Ltd EAT 0290/18* the EAT held that a tribunal had erred by rejecting B's claim that her dismissal was discriminatory contrary to S.15 on the basis that the employer did not know about her disability when it reached the decision to dismiss her, without also making a finding as to whether the employer had gained actual or constructive knowledge of her disability by the time it rejected her appeal against dismissal. On the facts of the case, B's complaint of unfavourable treatment in her dismissal had to be taken as referring both to the employer's initial decision to dismiss and to its subsequent rejection of her appeal.

321. We have also borne in mind that in the age discrimination case of *Reynolds v CLFIS (UK) Ltd 2015 ICR 1010, CA*, the Court of Appeal held that allegations of discrimination relating to a decision to dismiss and a decision on appeal were distinct claims that must be raised and considered separately. In the EAT's view, that approach applies equally to claims under S.15 EqA. It is important to consider whether the employer had the requisite actual or constructive knowledge at the time of the impugned treatment.

Discussion and conclusions

322. In respect of the point at which we must determine knowledge of disability, we remind ourselves that for discrimination under S.15(1) to be established, the employer must have the requisite knowledge of disability *at the time it treats the employee unfavourably*. In this case the treatment complained of is the selection of the Claimant and his dismissal by reason of redundancy.

323. That decision was made as a result of the scoring of the claimant by his managers Mrs Griffin and Mr Selman , the moderation of his scores subsequently by the respondent and the decision to therefore select him for redundancy and issue him with a letter of dismissal. The decision to reject his appeal confirmed that he would be dismissed. The claimant does not assert that the appeal itself was an act of discrimination by reason of section 15 section 20.

324. The Claimant's reasonable adjustment claim relies upon the PCP of assessing the claimant's performance from the most recent personal review appraisal and actual performance of October 2018 to March 2019.

325. We remind ourselves that the Respondent has conceded, in the amended grounds of response dated 1 July 2020, that the Claimant was a disabled person by reason of diabetes at the material time and that the Respondent knew or could reasonably have been expected to know that the Claimant was a disabled person by reason of diabetes

326. We remind ourselves that in the amended grounds, the Respondent concedes that the Claimant was a disabled person at all material times by reason of anxiety and depression, bur deny that they had actual knowledge of the disability or that it they could reasonably have been expected to have had knowledge of the disability at any material time.

327. The question that we have considered is what information the employer had before it at the point it made the decisions in the redundancy selection exercise, and whether the information that it did have meant that it ought to have made further inquiries of the Claimant or others about any impairment

and its impact on the Claimant, and what the result of those inquiries might have been.

328. We have also considered what would have happened, if the discrimination had not taken place and if a fair process had been followed.

329. We conclude on the basis of all the evidence and the facts found, and applying the legal principles that the respondent could reasonably have been expected to know that the claimant was a disabled person at all material times.

330. We conclude that the respond had sufficient knowledge of, or could have been expected to know, what the impact on the claimant would be, and of the disadvantage he would suffer, as a result of the PCP applied by them in the redundancy process.

331. We conclude that the discrimination arising from his sickness absence, and the failure to make a reasonable adjustment to the proess, meant that the Claimant was deprived of a total of 16 points. Had this been added to his score, his total final managers score would have been 74. We find that he was the only person subjected to discrimination, because he was the only person who had had a period of significant sickness absence,

332. Without the discrimination, and on the basis of manager only score, Mr Philips would not have been in the bottom two scores. He would have been in 7th position and not in 8th position.

333. As a result we conclude that he would not have been selected for redundancy.

334. We have also considered the result of the unfair scoring. If the additional score of 2 points from each manager, with a weighting of three, had been added, it would have given him an additional 6 points from each manager, and an overall total of an additional 12 points.

335. We have no evidence that anyone else was disadvantaged in this way, and find that the result of this unfairness coupled with the discrimination was to deprive him of a total of 28 additional points. Had this been added to his managers score of 58, his final score would have been 86 points. He would have been one of three people in 3rd place, and would not have been selected for redundancy.

336. The matter will now be listed for a remedies hearing.

Employment Judge Rayner

Date 13 July 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 15 July 2022 By Mr J McCormick

FOR EMPLOYMENT TRIBUNALS